

Draft - Issue Paper
Local Governmental Liability Exemption for
Certain Types of Solid Waste Facilities

Background

The Brownfields Study Group proposed the LGU solid waste exemption as a recommended statutory change in the 2001-2003 budget bill. It was carried over for consideration in 2003-2005, and is still on the table for further consideration at this time.

The recommended change provided that a local governmental unit (LGU) that is exempt from the clean-up requirements for a property under s. 292.11(9)(e), Stats. (the Spills Law), would also be exempt from the solid waste standards under s. 289.05, Stats., and rules promulgated thereunder, relating to solid waste on that property. As drafted, the exemption did not apply to municipal waste landfills, approved facilities, or to facilities where the local government caused the contamination. The reference to "...a municipal waste landfill, as defined in s. 289.01(22), Stats." creates very restrictive language relative to the types of solid waste facilities covered by the exemption. This language was patterned after the VPLE wording in s. 292.15(2)(d), Stats.

"Municipal waste landfill" (as defined in s. 289.01(22), Stats.) means a solid waste disposal facility that is not one of the following:

(a) A solid waste disposal facility designed exclusively for the disposal of waste generated by a pulp mill, paper mill, foundry, prospecting or mining operation, electric or process steam generating facility or demolition activity.

(b) A hazardous waste disposal facility.

Issue

This means that many of the small, unknown, historic fill sites--that are found throughout Wisconsin, and that the Brownfields Study Group asked be addressed in the Building on Abandoned Landfill Guidelines--would not be eligible for coverage by the proposed solid waste exemption because they are considered to be municipal waste landfills. This may be a narrower and more restrictive interpretation of what sites to include than desirable for purposes of encouraging brownfields redevelopment. Expanding the types of sites eligible for coverage by the exemption may be advantageous to LGU brownfield redevelopment efforts.

Recent discussions between the DNR's Bureaus for Waste Management (WA) and Remediation and Redevelopment (RR) have identified several issues concerning the draft exemption that may warrant further consideration. These include:

- 1) The universe of sites to include (or exclude) under the exemption;
- 2) The "technical" limits of the exemption, and whether the LGU should retain certain responsibilities under the exemption; and
- 3) Liability issues relative to s. 289.46(1), Stats., and possible expansion of the LGU cause of action and cost recovery options to include solid waste.

Each of these issues is discussed further in the following sections to enable expanded consideration by the Brownfields Study Group.

Options

1) The universe of sites to include (or exclude) under the solid waste (SW) exemption

As previously discussed, the current draft language of the proposed exemption concerning site types to be included is very narrow due to the exclusion of "municipal waste landfills" and "approved facilities". Many of the historic fill sites likely to be encountered during the redevelopment of brownfields would not be covered by the LGU SW exemption because they fall within the definition of municipal waste landfills.

The types of sites eligible for inclusion under the SW exemption may be directly proportionate to the perceived safety of their inclusion. Will they cause health or safety problems? What controls would exist over subsequent construction/development plans? How would new or larger environmental problems at those sites be prevented? Who would be financially responsible for environmental investigations and clean up?

Options for landfill sites where, if the LGU acquired them involuntarily, they would have limited environmental liability include:

- A. All sites covered by the LGU/SW Exemption. Since the Building on Abandoned Landfill Guidelines (April 2002) apply to **all** waste sites, written exemptions from the DNR are required prior to building on all sites, regardless of their size or complexity. Large, complex sites require more work than small, simple sites. But given that all sites require exemptions, virtually all sites could be made eligible for coverage by the LGU SW exemption from the "controls and construction" standpoint.
- B. Approved facilities (sites with approved plans of operation developed after 1975) have been mentioned as a subset of sites to exclude from coverage under the LGU/SW exemption. There are approximately 100 of these sites in the state. The size, complexity, and O&M requirements for these sites make them more difficult for the LGU, prospective developer, and DNR to deal with. The exemption process to get approval to build on these sites could be more detailed and problematic. They may represent the most logical subset of landfills to exclude from the LGU/SW exemption.
- C. Licensed facilities may be too broad a category to exclude from coverage. There are approximately 1000 sites in the state that have been or currently are licensed. They range from small, uncontrolled sites from the late 1960's, to the modern, mega-sites of today. The common factor is that the DNR has had some level of involvement with the site, although not uniform, over time. S. 289.46(1), Stats. appears to have major liability implications to how licensed sites can be handled (discussed later).
- D. Historic fill sites are landfills that were developed before 1970 that have not been licensed by the DNR. Many of these sites are the types that could be encountered unexpectedly through property acquisition and brownfields redevelopment. These are types of sites at which little is known, and responsible parties may be very difficult to identify. The current bill draft excludes many of these sites. WA and RR agree that these sites should be included under the exemption.

- E. LGU owned or operated sites. Regardless of what other categories are selected for exemptions, sites that are or have been owned or operated by the LGU are not eligible for an exemption.

2) The "technical" limits of the exemption, and whether the LGU should retain certain responsibilities under the exemption

The current draft of the bill is constructed parallel to the LGU exemption under the Spills Law. It includes exceptions to the liability exemption [s.292.23(3)(a)] for discharges caused by the LGU, for failure of the LGU to take actions directed by the DNR, for failure of the LGU to allow access to the property, and for not entering into an agreement with the DNR if Stewardship funds were used for acquisition.

However, the current language may not be as directly pertinent to solid waste sites as it is to hazardous substance spills. Furthermore, since Building on Abandoned Landfill exemptions are required before construction on many of these sites, the current draft bill does not clearly take this process into consideration. For large, complex sites, issues like pumping leachate, collecting landfill gas, maintaining caps and drainage facilities, and environmental monitoring programs may also be pertinent.

Discussions between the Bureaus of WA and RR have identified some of these issues for possible revisions to the draft bill. Key points of those discussions included:

- 1) Whether an LGU should have any requirements to maintain sites with existing, active leachate and/or methane collection systems, or sites with requirements for maintenance of existing landfill caps or groundwater monitoring.
- 2) For licensed landfills subject to the SW exemption, language should be incorporated to make the exemption applicable "notwithstanding s. 289.46(1)". [See liability discussion under item **3**) below.]
- 3) WA was interested in incorporating language, and/or modifying ch. 289, so that acquisition of title by an LGU would not preclude the DNR's ability to still pursue past owners and operators of the site for maintenance, investigation and clean up requirements.
- 4) The process for getting DNR approval to build on a landfill should still be required of an LGU that qualifies for the LGU/SW liability exemption. The LGU may not undertake any construction without prior written approval from the Department, and may not undertake any activity that interferes with a closed facility, or causes a significant threat to public health, safety, or welfare.
- 5) Some further consideration may be appropriate to identify what statutes or rules (other than s. 289.05) should be covered by the LGU/SW exemption.
- 6) The exemption should not be applicable to waste generated on the site by the LGU or contractors.
- 7) The exemption should not apply to land use restrictions that are necessary to prevent damage to a cap over waste on the property, or to prevent otherwise incompatible uses.

3) Liability issues relative to s. 289.46(1), Stats., and possible expansion of the LGU cause of action and cost recovery options to include solid waste.

WA has expressed a major concern about the types of sites eligible for inclusion under the proposed LGU SW exemption, and the DNR's ability to continue to pursue the past owners and operators of the sites as financially responsible parties. This concern stems from s. 289.46(1), Stats. which states:

"Any person acquiring rights of ownership, possession or operation in a licensed solid or hazardous waste facility at any time after the facility begins to accept waste is subject to all requirements of the license approved for the facility including any requirements relating to long-term care of the facility and is subject to any negotiated agreement or arbitration award related to the facility under [s. 289.33](#). Upon acquisition of the rights, the department shall issue a new operating license if the previous licensee is no longer connected with the operation of the facility, if the new licensee meets all requirements specified in the previous license, the approved plan of operation, if any, and the rules promulgated under [s. 291.05](#) or [291.07](#), if applicable."

In addition to the LGU/SW Exemption language proposed in s. 292.23, it will also be important to modify s. 289.46 to state that when governmental units acquire ownership through the specified means mentioned in the draft bill, the previous owner or operator is still responsible for complying with requirements of the license. If this change can be made to 289.46, it may be possible to let the LGU SW exemption apply to most or all licensed landfills. The universe of sites eligible for coverage under the exemption may have to be reduced if the DNR's ability to keep past owners and operators on the hook is lost, and the LGU is exempted from taking on the owner's responsibilities.

Given the complexity of waste sites, and the potential costs involved for the LGU in managing, maintaining, and cleaning them up, possible expansion of the LGU cause of action and cost recovery options to include solid waste may also be desirable. Expanding these LGU rights may also serve as an incentive for the LGU to look at the potential for acquiring and redeveloping these waste site brownfields.

Next Steps -

After these issues are discussed with the LGU subgroup and the Brownfields Study Group as a whole, RR will prepare recommended drafting instructions to the Legislative Reference Bureau. A revised draft on the SW exemption bill will be prepared in time for consideration during the January 2005 legislative session.